

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MATERIAL YARD WORKERS LOCAL 1175 BENEFIT FUNDS
Employer

and

LOCAL 175, UNITED PLANT AND
PRODUCTION WORKERS
Petitioner

Case No. 29-RC-10393

and

BUILDING, CONCRETE, EXCAVATING
AND COMMON LABORERS, LOCAL 731,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA (LIUNA), AFL-CIO
Intervenor¹

DECISION AND DIRECTION OF ELECTION

The Material Yard Workers Local 1175 Benefit Funds (herein called the Funds or the Employer) are trust funds governed by the Taft-Hartley Act, having an equal number of employer trustees and union trustees. The Funds provide health and other benefits to employees of participating employers. As the name indicates, the Funds were originally established for the benefit of employees represented by Local 1175, a now-defunct local of Laborers International Union of North America, AFL-CIO (Laborers Local 1175). On June 6, 2005, Local 175, United Plant and Production Workers (the Petitioner) filed a

¹ During the hearing, the Hearing Officer granted Laborers Local 731's to intervene, based on a showing of interest. However, as discussed in detail below that ruling is reversed herein, inasmuch as Local 731 is disqualified from representing the Funds employees due to a conflict of interest.

petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of clerical employees employed by the Funds. Another union, Building, Concrete, Excavating and Common Laborers, Local 731, Laborers' International Union of North America, AFL-CIO (Laborers Local 731) moved to intervene based on a showing of interest. Laborers Local 731 became the successor union to Laborers Local 1175, after Local 1175 was placed into trusteeship by the International Union (LIUNA) and the two locals merged. Employees who were formerly represented by Laborers Local 1175 are now represented by Laborers Local 731, but they continue to receive benefits from the Local 1175 Benefit Funds, the Employer in this case.

The parties stipulated that Laborers Local 731 is a labor organization as defined in Section 2(5) of the Act. However, the Funds and Laborers Local 731 declined to stipulate to the Petitioner's status as a labor organization under Section 2(5). An additional issue also arose regarding a potential conflict of interest in allowing Laborers Local 731 to represent the Funds' clerical employees, due to that union's involvement in the Funds as an employer. A hearing was held before Nancy Reibstein, a hearing officer of the National Labor Relations Board.

As discussed in more detail below, I find that the Petitioner is a labor organization as defined in Section 2(5). I also find that Laborers Local 731 is disqualified from representing the Funds' employees due to a conflict of interest. I will therefore direct an election wherein employees will vote whether they wish to be represented by the Petitioner, but Local 731's name will not appear on the ballot.

Labor Organization Status of Petitioner

Section 2(5) of the Act defines a labor organization as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Petitioner's president, Richard Tomaszewski, Jr., testified that the Petitioner exists for the purpose of representing employees in the asphalt, concrete and recycling industries. Specifically, Tomaszewski stated that the Petitioner seeks to get "the best contracts available" to improve employees' wages, benefits, hours and other working conditions, and to represent employees in connection with grievances. Tomaszewski further testified that employees participate in the organization by attending meetings and voting for officers. For example, employees participated in an election for officers when Local 175 was formed in 2003. Finally, Tomaszewski testified that the Petitioner recently executed a collective bargaining agreement with Milco Asphalt, and is in the process of negotiating agreements with other employers at this time.

In short, Tomaszewski's testimony establishes that the Petitioner exists for the purpose of dealing with employers concerning grievances and other terms and conditions of employment. Employees participate in the Petitioner's organization, for example, by attending meetings and participating in elections for union officers. Thus, the Petitioner clearly meets the broad definition of labor organization in Section 2(5) of the Act. *See also Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962).

Laborers Local 731 claimed that Local 175 is not a labor organization because certain of its participants were involved in a corruption scandal when they were previously employed by Laborers Local 1175. Specifically, in an offer of proof, the Intervenor alleged that former Local 1175 business manager, Fred Clemenza, Jr., who had

embezzled money from that union and its benefit funds, was somehow involved in the formation of Local 175. However, the Hearing Officer ruled that such contentions were irrelevant to Local 175's status as a labor organization, and rejected the offer of proof.

The Hearing Officer also refused to admit into evidence certain documents proffered by the Intervenor, including an attendance sheet for a Local 175 meeting in 2003 (marked for identification as Intervenor Exhibit 1)², a LIUNA hearing officer's order regarding Local 1175's trusteeship (marked as Int. Ex. 2), a settlement agreement involving someone named Charles Clemenza (marked as Int. Ex. 3), and LIUNA hearing officer's report regarding Fred Clemenza's misconduct (marked as Int. Ex. 4).

The Hearing Officer correctly ruled that such questions were irrelevant, and I hereby affirm her rulings. Contrary to Local 731's contentions, the alleged misconduct of people who may have been involved in forming the Petitioner's organization has no bearing whatsoever on whether the Petitioner is a labor organization as statutorily defined. Even if the facts alleged by Local 731 were assumed to be true, it would not change the fact that the Petitioner exists for the purpose of dealing with employers and therefore meets Section 2(5)'s broad definition.

As the Board said in Alto Plastics, *supra*:

[I]t must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a "good" labor organization, a "bad" labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative. In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. If an organization fulfills

² References to the record are hereinafter abbreviated as follows: "Int. Ex. #" refers to Intervenor Exhibit numbers, and "Bd. Ex. #" refers to Board Exhibit numbers.

these two requirements, the fact that it is an ineffectual representative, ... that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

136 NLRB at 851-2.

Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5).

The conflict of interest issue

As noted above, employees in the asphalt, concrete and recycling industries who were formerly represented by Laborers Local 1175 are now represented by Laborers Local 731, after the Laborers International union decided to place Local 1175 into trusteeship in 2003, and eventually merged Local 1175 with Local 731 in early 2005. Nevertheless, employees who were formerly represented by Local 1175 continue to receive benefits from the Local 1175 benefit funds, the Employer in this case. (It appears that Local 1175' s benefits funds were not merged with Local 731' s own benefit funds.)

The Funds employ three clerical employees at their office in Howard Beach, New York. These employees administer the benefit funds, under direction of the board of trustees. There is no collective bargaining history for the Funds' clerical employees.

The record in this case reveals that the Funds' board of trustees has an equal number of employer trustees and union trustees. Specifically, the two employer trustees are Richard Grace, owner of Grace Industries, Inc., a manufacturer of asphalt products, and Frank Castiglione, the owner of JED Asphalt. The two union trustees are Frank

Ombres, who is also the secretary-treasurer of Laborers Local 731, and Ronald Valdner who is apparently a Local 731 member.

Tomaszewski testified that the Funds' three clerical employees report to trustee Frank Ombres. It is not clear from the record whether Tomaszewski has any first-hand knowledge of the Funds' workings, but he offered hearsay evidence to the effect that one employee said that the clerical employees have to deal with Ombres for wage increases and other matters regarding their employment. There is no dispute that Ombres is also the secretary-treasurer of Local 731.

Before and during the hearing, there was a great deal of confusion regarding which attorney(s) represented the Funds and/or Local 731. On May 24, 2005, in response to a letter from the Petitioner to the Funds requesting recognition as the collective bargaining representative, attorney Angelo Bisceglie, Jr., of the law firm Bisceglie & Friedman, stated that the trustees declined to recognize the Petitioner, and directed the Petitioner to address any future correspondence to *either Ronald Straci, Esq. or to Bisceglie* (Bd. Ex. 2). After the instant petition was filed on June 6,³ attorney Catherine Liu of Bisceglie & Friedman also sent a letter on June 16, *stating that she represented both Local 731 and the Funds..* (The letter is appended to this Decision as Bd. Ex. 6.⁴) When the hearing opened on June 21, Liu initially appeared on behalf of Local 731 only. However, after off-the-record telephone calls to Ronald Straci's office and to Bisceglie & Friedman, Liu stated that she represented both Local 731 and the Funds for the purpose of

³ All dates hereinafter are in 2005, unless otherwise indicated.

⁴ This document was not offered into evidence at the hearing. Nonetheless, I find that it is authentic and is relevant to the resolution of this issue. Accordingly, I have decided to receive it as Board's Exhibit 6. (See attachment A)

the hearing. When the parties later executed a stipulation (Bd. Ex. 5), Liu signed on behalf of both Local 731 and the Funds.

The Board has held that a local union is not qualified to represent employees of benefit-fund employees, where the union has conflicting allegiances to the funds as the employer. Welfare and Pension Funds, 178 NLRB 14 (1969). *See also* Centerville Clinics, Inc., 181 NLRB 135 (1970)(United Mine Workers local cannot represent employees of medical clinic established by the UMW and partially funded by UMW connected trust funds). As the Board has explained, a union must "approach the bargaining table with the single-minded purpose of protecting and advancing the interests of the employees," without "ulterior purpose" or conflict of interest. Welfare and Pension Funds, *supra* at fn.1, citing Bausch and Lomb Optical Co., 108 NLRB 1555 (1954). Thus, where a union has "direct and immediate allegiances which can fairly be said to conflict with" its duty to represent employees, "it cannot be a proper representative." 178 NLRB at 14. In the Welfare and Pension Funds case above, the Board dismissed a representation petition filed by a United Brotherhood of Carpenters local (UBC), seeking to represent certain employees of UBC-affiliated benefit funds.

Such conflicts have arisen in unfair labor practice cases as well. In Child Day Care Center, 252 NLRB 1177 (1980), a day-care center run by an Amalgamated Clothing and Textile Workers Union (ACTWU) Joint Board benefit fund recognized ACTWU Local 1080A as the representative of the center's employees. One trustee for the fund (i.e., for the employer) was also a Local1080A business agent (i.e., for the union). When a grievance arose regarding an employee's layoff, the trustee/business agent represented

the employee, while a fellow trustee represented the employer/fund. The Board concluded that the employer/fund violated Section 8(a)(2) of the Act by recognizing Local 1080A because of the local's conflict of interest. The Board particularly relied on the "dual role" of the fund trustee (i.e., employer) who also served as the local's business agent (i.e., union). 252 NLRB at 1177, [n. 7.

Similarly, in companion "CA" and "CB" cases Teamsters Local 688 Insurance and Welfare Fund and Teamsters Local Union No. 688,298 NLRB 1085 (1990), a Teamsters local represented employees of a joint Teamster-employer benefit fund with two trustees. The union-appointed trustee on the employer's board (Ron Gamache), who had close day-to-day involvement in the employer/fund's personnel matters, was also the secretary-treasurer and chief executive officer of the union. When one employee (Carolyn Suzie Robertson) approached a union representative (Donna Steininger) regarding Robertson's inability to convince Gamache (as the employer) to allow her to return to work after an injury, Steininger responded: "There is nothing I can do if Ron [Gamache, who was also Steininger's boss in the union] says you cannot go back to work. .. It is his prerogative." The Board found that the conflict of interest, as demonstrated by Robertson's plight, was "substantial and insurmountable." 298 NLRB at 1087. The Board concluded that the Employer violated Sections 8(a)(2) and (3) of the Act, and that the local violated Sections 8(b)(1)(A) and (2), by maintaining and enforcing their contractual union security clause, when the local was disqualified from acting as the Fund employees' representative.

In the instant case, Laborers Local 731 seeks to represent employees employed by the trust funds, where two of the four trustees were appointed by Local 731. More

importantly, one of the employer's trustees, Frank Ombres, is also an officer of the union. This presents a substantial and insurmountable conflict of interest. If, in the future, a clerical employee employed by the Funds has a conflict with the Funds and seeks to pursue a grievance, there is a serious question of how vigorously a Local 731 representative would pursue the grievance against a board of trustees which includes Local 731's own secretary-treasurer and another Local 731 member. How could Local 731 negotiate a contract with the required "single-minded purpose," when it is negotiating with a fund that provides benefits to its own members? The conflict here is further exemplified by the confusion regarding the two entities' legal representation in this case. When the Funds and Local 731 have the same attorney, it is obvious that Local 731 has trouble separating its interests as a union -- and the interests of the clerical employees - from the interests of the Funds as an employer.

Accordingly, based on the foregoing, I conclude that Laborers Local 731 is disqualified from representing employees of the Funds. I hereby reverse the hearing officer's ruling allowing Local 731 to intervene.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing, other than the intervention matter noted above, are free from prejudicial error and hereby are affirmed.
2. The record indicates that the Funds, with their sole office and place of business located at 161-08 Cross Bay Boulevard, Howard Beach, New York, are engaged in providing health and other benefits for employees of participating employers. During

the past year, which period represents their annual operations generally, the Funds received contributions valued in excess of \$50,000 directly from employers located outside the State of New York, which employers in turn annually purchase and receive goods valued in excess of \$50,000 directly from points outside the State of New York. The parties stipulated, and I hereby find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner, a labor organization, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find, that the following employees .constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time clerical employees employed by the Employer at the 161-08 Cross Bay Boulevard, Howard Beach, New York facility, excluding guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 175, United Plant and Production Workers. The date, time, and place of the election will be

specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with

them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before July 7, 2005. No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to

the election are filed. Section 103 .20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST **on July 14, 2005**. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.com.

Dated: June 30, 2005.

S/S

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

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ATTACHEMENT A

June 16, 2005

Via Facsimile (718) 330-7579)

Nancy Reibstein, Board Agent
National Labor Relations Board - Region 29
One MetroTech Center North, 10th Floor
Brooklyn, N.Y. 11201

Re: Petition for an Election
Material Yard Workers Local 1175 Benefit Funds Petitioner -
United Plant & Production Workers, Local 175

Dear Ms. Reibstein:

This firm represents Local 731, into which Local 1175 was recently merged, and the Local 1175 Fringe Benefit Funds.

It has come to our attention that in addition to Connie Henry and Joanne Bianco, there is another clerical worker who should be part of the bargaining unit, whose name is Monica Giampolo.

If there is any further information I may provide, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

BISCEGLIE AND FRIEDMAN, L.L.C.

Catherine B. Liu

cc: Frank Ombres, Secretary-Treasurer. Local 731 (Via Facsimile)

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BOARD EXHIBIT 6

